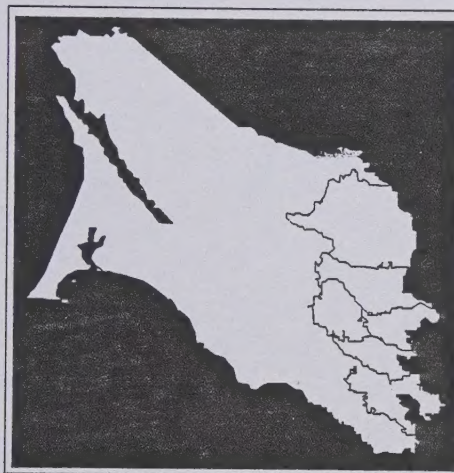


The Marin Countywide Plan

Trails Element Technical Report #1 Acquisition, Development, Maintenance, and Design of Trails



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TRAILS ELEMENT TECHNICAL REPORT #1

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EXECUTIVE SUMMARY

Marin County residents have long demonstrated a respect for the natural environment and a desire to preserve that environment for the enjoyment of the public. The Marin Countywide Plan adopted in 1973 included a policy to develop a system of bicycle, hiking, and riding trails to connect open space, residential areas, and activity centers. The County adopted a Trails Element in 1984 which identified a network of 533.6 linear miles of trails in the County in a series of policy maps. In 1991, 464 linear miles of the trails network were open to the public, including 26 miles of paved pathways.

Acquisition of public rights-of-way for the trails network is a difficult issue and is addressed in this technical report. Trails are acquired for public use via: 1) gifts of land and easements, 2) prescriptive rights of trail use, 3) purchase, and 4) dedication of trail easements and trails.

Requiring trails dedication prior to issuance of development permits will be more difficult for public agencies since the 1987 Supreme Court decision on *Nollan v. California Coastal Commission*. The court established that there must be a clear "nexus" between an exaction, such as a trail dedication requirement, and the impact that the development will have. The *Nollan* decision requires that dedication requirements for public access directly respond to the type of burden on access created by that development.

Funding for the purchase of trails easements could be generated from foundation sources, State recreation programs and new local taxes. The County Parks, Open Space, and Cultural Commission has appointed an Open Space/Trails Committee which works with the Open Space District staff to review upcoming development applications for potential trails easements.

Trails development is the responsibility of the public entity accepting a dedicated easement. Often the entity is a public agency other than the County, such as Marin Municipal Water District, Golden Gate National Recreation Area or the State Parks System. In 1988, trails cost between \$1.00 and \$7.00 per linear foot to construct, not including the cost of parking, fencing, posting, and other needed amenities.

Although trails design and development are largely a function of the terrain underlying a trails easement, the new trails policies call for protecting the adjacent environment and the rights of adjacent property owners while accommodating a broad range of trail user needs. Specifically, the trails system as a whole should reflect a consideration of the abilities and interests of persons with various physical impairments and the elderly in that at least some trails should be accessible to the handicapped.

Trails maintenance responsibility lies with the public entity accepting a dedicated easement or the underlying property owner if the dedication has not been accepted. Trails sometimes require seasonal closures, repair of amenities such as benches and signs, drainage, the clearing of brush and surface repair. A number of volunteer organizations in the county offer to maintain trails that are not located within park and open space boundaries.

Public and private liability for injuries experienced while on the trail are addressed in several sections of the California Government Code, including Sections 815, 831.2, 831.4, 831.7 and 846. These sections of code set limits on public liability and lay out standards for both public and private immunity from liability so that trails may reasonably be enjoyed by the public.

I. BACKGROUND

Marin County residents have long demonstrated a respect for the natural environment and have a desire to preserve that environment for the enjoyment of the public. This perspective was first articulated in the planning report, Can the Last Place Last? (1971). This report stated that trails were important to the County's future open space objectives through providing "a continuous linkage system connecting large park and reserve open spaces that are now separated and to extend hiking, bicycling, riding, trail and scenic road networks from the Bay shore communities to the Ocean."

The Marin Countywide Plan first adopted in 1973 included a policy to develop a system of bicycle, hiking, and riding trails, which would connect open space, residential areas, and activity centers. Implementation included paths and trails in park and open space programs, and the procurement of trails through dedications, the acceptance of gifts, or purchase. The Marin County Trails Element, adopted in 1984, gave detailed form to the eventual trail network in the County in a series of policy maps.

This report analyzes issues in each of the following areas: acquisition, development, maintenance of and liability for the trails network. The report suggests solutions to current problems and concludes with proposed policies and implementation measures for amendment to the Trails Element.

II. TRAILS ACQUISITIONS

The Marin County Trails Committee has identified over 200 miles of trails proposed for Marin County. These trails may be significant as recreational resources or may serve as important links for existing recreational facilities.

Trails are acquired for public use via: 1) gifts of land and easements, 2) prescriptive rights of trail use, 3) purchase, and 4) dedication of trail easements and trails.

A. GIFTS OF LAND AND EASEMENT

The acceptance of gifts of trails and trail rights-of-way is a viable means of preserving trails for public use. Individual owners may find it to their advantage to offer a gift of a trail that is currently being used by the public. The advantages may include, but not be limited to: income tax benefits for the donor, elimination of maintenance of the trail by the original owner, added security on the trail by increased or new patrolling by the accepting public agency, shift of legal liability to the accepting public agency, as well as the opportunity for philanthropy to benefit the community.

B. PRESCRIPTIVE RIGHTS OF TRAILS USE

Trail preservation by prescriptive right is a method that has been utilized in the past and could be effectively utilized in the future. The law provides that when public access across private property has been unimpeded by the land owners for a period of five or more years, the public has, in fact, gained a permanent right to use this access or trail.

C. PURCHASE

Purchase of trail easements and trails may be necessary in some cases where, because of timing or other reasons, other methods are not practical.

D. DEDICATION OF TRAIL EASEMENTS AND TRAILS

Dedication of trails and trail easements has been the principal method of preserving trails within Marin County. As undeveloped lands traversed by important trail connections are considered for development, the public entity reviewing the development proposal may require the dedication of trail easements and/or the improvement of trails in accordance with the adopted Trails Element.

County and city subdivision ordinances presently contain legal authority to require easement dedications. In light of the recent Supreme Court decision in the *Nollan v. California Coastal Commission* case, each required dedication will need to carefully establish the direct "nexus" test set forth by the Court.

To ensure that trails dedications are secured, the County Open Space District staff has assumed informal responsibility for reviewing development plans and recommending rights-of-way for dedication to County Planning staff in unincorporated areas. If a trail is indicated for a particular property, a request is made of the developer to dedicate an easement for the trail to the public as part of the development process.

Once the easement is secured through negotiations, a formal offering of the easement is made by the developer and is represented on the final map or as a written legal description. The property owner retains ownership and title to the land upon which the easement lies. The public is simply allowed the use of the land for a trail. An easement offered for dedication runs with the land in perpetuity.

Possible County responses to the offer of dedication are:

Consent to recordation of the easement. In this case an easement is recorded as a legal description with the County Recorder. This easement does not disappear unless someone petitions to vacate it.

Reject the dedication. In this case the easement is reserved as a legitimate right of the public, yet is not accepted by a public entity for trail development, maintenance and liability. The offer of dedication may be subject to acceptance at a later date.

Accept the dedication. In this case, responsibility for trail development, maintenance, and liability is accepted by a receiving entity. The receiving entity may be the Department of Public Works, the Open Space District, a legal jurisdiction, service district, or non-profit organization such as The Nature Conservancy. The assignment of the receiving entity should be made at the time of dedication.

III. ACQUISITION ISSUES

Since the acquisition of trails through the use of dedications may be limited in the future by the Nollan decision, the facts of this case and its ramifications for future planning are presented below.

A. NOLLAN V. CALIFORNIA COASTAL COMMISSION

The State has broad powers to regulate land for the health, safety, and general welfare of its populace. In so regulating, the State must establish that the regulation: 1) advances a legitimate State interest; 2) furthers the State interest which it was designed to serve; and 3) allows for a reasonable, beneficial use of the land.

James and Marilyn Nollan contested a requirement to permit public access across the sand beach between their seawall and the high tide line in order to obtain a permit to enlarge their beachfront home. The Nollans contended that the required donation of a public right-of-way constituted a taking of private property for public use without just compensation, a governmental act forbidden by the Constitution. The Coastal Commission asserted that the proposed structure reduced visual access to the beach from the coastal highway. The right-of-way requirement was a mitigation measure, a substitution of physical access for the loss of visual access.

California courts have held that the dedication of real property as a condition to the receipt of a development permit is a valid exercise of governmental authority where the dedication has been reasonably related to lessening the adverse impacts of development. In *Nollan v. California Coastal Commission*, the Supreme Court reaffirmed the broad scope of governmental authority to regulate land use, but articulated a much stricter requirement for a nexus between the impact of that development and the dedication required to alleviate that impact.

Assuming the legitimacy of the State's interest and the retention of economic viability of the property with the dedication requirement, the Court ruled in favor of the Nollans. The court found that the condition placed on development failed to further the State interest advanced as justification for the condition. It dismissed the substitution of physical access for visual access as merely a play on words. The requirement of a direct relationship, a "nexus" between the land use regulation and the State interest, was underscored. The Court affirmed the validity of dedications which specifically address the burden created by a particular project.

The Nollan decision requires that dedication requirements for public access directly respond to a type of burden on access created by that development. In his article "Property Rights in the Supreme Court", Joseph Sax says that had the Coastal Commission "predicated its regulation on a showing of long standing public use, and some evidence that development was deterring that use, a regulation or exaction designed to mitigate that effect would likely have been upheld" (Sax, 1987).

In Marin County, "prescriptive rights" may be argued as a basis for requiring dedications on popular trails which have been used over the years by the public. On those properties where the public has long enjoyed a path across the land, development which impedes that path of travel may be required to dedicate an easement as a remedy for the impact of the development.

In the future, dedications will need to be carefully established in order to meet the rigorous scrutiny of the Nollan decision. However, this decision should not deter the pursuit of dedications. "Even a valid governmental purpose and public benefit may not be enough to obtain a dedication unless the County or other public entity is willing to purchase the easement. It is clear that the U. S. Supreme Court will inspect an exaction more closely to ensure that certain individuals alone are not forced to bear public burdens which, in fairness and justice, should be borne by the public as a whole" (Armstrong v. U. S. (1960) 354 U. S. 40, 49, and Nollan v. Coastal Commission).

B. FUNDING FOR TRAILS ACQUISITIONS

Since the Nollan decision tightened the rules under which dedications may be required as a condition of development, the County should explore funding possibilities for the acquisition of trails. Such possibilities include a ballot initiative increasing the Open Space District Tax and the application for foundation monies.

C. COORDINATION OF TRAIL ACQUISITIONS

A seven-member Trails Committee oversees trails planning for Marin County. This standing committee of the County Parks, Open Space and Cultural Commission meets monthly. The committee reviews upcoming development projects with the purpose of obtaining trails dedications, planning trails that connect publicly-owned lands, and making recommendations for development and implementation of the Trails Element policies.

The Planning Department and Open Space District are responsible for comprehensive trails planning. The Planning Department prepares the Trails Element and Trails Element Map Series. The Open Space District implements the Element and manages the trails. District staff and the Trails Committee review development permits for potential acquisition of trails designated in the Map Series.

Trails of local significance may not necessarily be represented in the Trails Element Map Series. These trails are often short, but offer local trail users with a multipurpose alternative to paved public roads. When proposed development threatens to remove these shorter trails, the County encourages local groups to preserve the trails.

IV. TRAILS DEVELOPMENT

A. RESPONSIBILITY

The responsibility for trails development lies with the property owner or the public entity accepting a dedicated easement.

B. COST

The cost of developing a trail is dependent upon several factors; trail type, slope, soil condition, the method of trail construction, materials used, etc. A 1988 survey of the Golden Gate National Recreation Area, Open Space District, California State Parks, the Marin Conservation Corps, and Trail Center to obtain information on trail construction costs found the construction cost for a four-foot wide hiking trail constructed with a backhoe tractor by a skilled crew to be \$1.10 to \$1.50 per linear foot. Use of a hand crew, such as the Marin Conservation Corps, cost between \$3.00 and \$7.00 per linear foot. The Open Space District purchased a trailmaking machine, which lowered the cost of construction to less than \$1.00 per linear foot.

C. ACCESSIBILITY

Many trails lend themselves to use by persons with disabilities. Multipurpose pathways which accommodate pedestrians and bicycle riders are ideal for barrier-free access and should be planned accordingly. In most cases, existing gradients and curb cuts designed for cyclists offer satisfactory wheelchair access. Barriers placed at entrances to pathways for prohibiting entry by motorized vehicles must be designed to accommodate wheelchairs, unless such use would be unsafe or cause severe management problems.

In accordance with State and Federal accessibility policies for recreational facilities, the county's trails should be designed whenever possible in consideration of the abilities and interests of a diverse population, including persons with disabilities and the elderly. A sensitively designed trail must have a continuous "path of travel," meaning no breaks or interruptions in the route such as streams, impassable barriers or gates.

The trail should have a solid, slip resistant surface, and a continuous, unobstructed route of no more than 5% in slope. The cross-slope (side-to-side grade) should be no more than 2% to prevent tipping over and falls. Other important features include: safe, level, and accessible parking; accessible drinking fountains, toilets, phones; and trail information at the trailhead.

The County needs a map showing accessible trails and describing their characteristics. Currently, the County does not have a good map of accessible trails, although some portions of existing trails may already be accessible.

V. TRAILS MAINTENANCE

A. RESPONSIBILITY

The responsibility for trail maintenance lies with the property owner or the public entity accepting a dedicated easement.

B. RESOURCES

The maintenance of trails requires seasonal closures if appropriate, managing user groups, the repair of amenities such as benches and signs, trail drainage, the clearing of brush, and surface repair. Such work may be contracted out on a private basis, or secured through volunteer organizational effort.

Organizations which may participate in trail construction and maintenance include the Marin Conservation Corps, the Tamalpais Conservation Club, the Sierra Club, equestrian groups, Boy Scouts and Girl Scouts.

VI. LIABILITY

The existing trails policy refers to preserving "trails for public use with due consideration of liability exposure of property owners adjacent to the trail." This reference oversimplifies the true complexity of the liability issue which, in practice, defied such a simplistic approach. The following section discusses briefly the liability protection both public entities and private individuals have under primarily California law.

A. CALIFORNIA LAW

A number of statutes have been enacted by the legislature to address the various conditions under which liability may be established and those conditions under which liability is limited to both public entities and private individuals. However, the statutes are vague, and the subtle nuances of the case law require detailed review.

B. PUBLIC LIABILITY

California Government Code Section 815 established the immunity government has from being sued while carrying out public policy. However, the Federal Tort Claims Act provides the framework for bringing just such suits against the government.

California Government Code Section 835 holds public entities liable for dangerous conditions on their property if the conditions create a reasonably foreseeable risk of injury. The public entity must be negligent in either: 1) creating the condition; or, 2) taking action to correct the condition (once notice is given) to establish the basis for a lawsuit.

The legislative committee comment on the statute goes even further to state that: "Even if the elements stated in the statute are established, a public entity may avoid liability if it shows that it acted reasonably in the light of the practicability and cost of pursuing alternative courses of action available to it."

A defense such as "comparative negligence" or "assumption of risk," may also be used to avoid liability under this statute. Under such a defense, the government may claim that a plaintiff has acted negligently or to have knowingly and freely assumed a risk which resulted in injury.

There are three California Government Code sections which address the issue of public liability on lands used for recreational purposes:

1. California Government Code Section 831.2 states: "Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach."

In his analysis of Section 831.2, Van Alstyne says, "The scope of immunity is not entirely clear; the act does not provide a precise standard for determining when, as the result of developmental activity, public property in its natural state ceases to be unimproved. However, it appears that some form of physical change in the condition of the property at the location of the injury, which justifies the conclusion that the public entity is responsible for reasonable risk management in that area, may be required to preclude application of the immunity" (Van Alstyne, 1985).

2. California Government Code 831.4 states:

A public entity, public employee, or grantor of a public easement to a public entity for any of the following purposes, is not liable for an injury caused by a condition of:

- (1) Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas and which is not a ... public street.
- (b) Any trail used for the above purposes.
- (c) Any paved trail, walkway, path, or sidewalk on an easement of way which has been granted to a public entity, which easement provides access to any unimproved property, so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of any condition of the paved trail, walkway, path or sidewalk which constitutes a hazard to health or safety. Warnings required by this subdivision shall only be required where pathways are paved, and such requirement shall not be construed to be a standard of care for any paved pathway or road.

The legislative committee comment under Section 831.2 states that this section and Section 831.4 continue to extend an existing policy adopted by the Legislature in former Government Code Section 54002. "It is desirable to permit the members of the public to use public property in its natural condition

and to provide trails for hikers and riders and roads for campers into the primitive regions of the State. But the burden and expense of defending claims for injuries would probably cause many public entities to close such areas to public use. In view of the limited funds available for the acquisition and improvement of property for recreational purposes, it is not unreasonable to expect persons who voluntarily use unimproved public property in its natural condition to assume the risk of injuries arising therefrom as a part of the price to be paid for benefits received."

3. California Government Code Section 831.7 sets limits on public liability to "any person who participates in hazardous recreational activity...who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself..." The definition of hazardous recreational activities includes animal riding and bicycle racing, activities which may occur along trails.

C. PRIVATE LIABILITY

Protection for the private property owner who dedicates an easement for the enjoyment of the public is afforded by California Civil Code Section 846. It states that an owner of any estate in real property owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose, excepting willful or malicious failure to guard against or warn of dangerous conditions.

D. MARIN COUNTY EXPERIENCE

According to the County Counsel's office, no trails related cases have gone to court in the past few years. A number of bike-trail related cases have been brought against the County, resulting in substantial legal efforts and exposure.

E. REFERENCING LIABILITY WITHIN THE TRAIL ELEMENTS

The subject of liability will be omitted from the Trails Element for the following reasons:

1. As this report indicates, liability is a complex issue. cursory summations for inclusion within a planning document belie this complexity and thus are not appropriate.

2. Omitting liability discussions from Plan Elements is common practice. One can easily imagine the liability issues attendant to the Transportation and Environmental Hazards elements, yet the subject is not typically discussed in these State-mandated elements. Therefore, there should be consistency in the treatment of liability issues in such optional elements as the Trails Element.
3. The liability reference may in of itself be provocative and thus undermine the spirit and intent of the Trails Element.

APPENDIX 1. BIBLIOGRAPHY AND PERSONS CONSULTED

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Persons Consulted

1. Fran Brigmann, Open Space Planner, Marin County Open Space District
2. Phyllis Cangemi, Executive Director, Whole Access, Redwood City
3. Don Dimitratos, Director of Marin County Parks, Open Space and Cultural Commission
4. Marc Koenings, Golden Gate National Recreation Area
5. Casey May, Marin Municipal Water District
6. Greg Picard, California State Parks
7. Jean Starkweather, Marin County Parks and Cultural Commission, Trails Committee Chairman
8. Karin Urquhart, Executive Director, Marin Conservation League
9. Jack Williams, Point Reyes National Seashore
10. Brian Wittenkeller, Consultant

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes the need for transparency and accountability in financial reporting.

2. The second part of the document outlines the various methods and techniques used to collect and analyze data. It includes a detailed description of the experimental procedures and the statistical analysis performed.

3. The third part of the document presents the results of the study. It includes a series of tables and graphs that illustrate the findings of the research. The data shows a clear trend of increasing activity over time.

4. The fourth part of the document discusses the implications of the findings. It suggests that the results have significant implications for the field of study and may lead to further research in this area.

5. The fifth part of the document provides a conclusion and summarizes the key points of the study. It reiterates the importance of accurate record-keeping and the need for ongoing research in this field.

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